Petition

No. 81-1332

FILED
JAN 18 1982
ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States

October Term 1981

BOB LEE ROBERTS,
Petitioner,

v.

STATE OF CALIFORNIA,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF CALIFORNIA FOR THE FOURTH APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

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STATE OF CALIFORNIA,

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF CALIFORNIA FOR THE FOURTH APPELLATE DISTRICT

QUESTIONS PRESENTED

Petitioner has served the maximum term of confinement otherwise possible following his conviction of an offense. His confinement, in mental institutions rather than a state prison, for such maximum period was made possible by an initial adjudication that he was amenable to psychiatric assistance. Where

the state now seeks to extend petitioner's confinement beyond the maximum term otherwise set by law, does the Due Process clause of the Fourteenth Amendment require, at a minimum, that petitioner be permitted an opportunity to present evidence on the question of his amenability to such treatment?

Petitioner is a member of that class of persons (1) convicted of an offense and (2) deemed amenable to psychiatric assistance. The latter finding has resulted in petitioner's confinement for a period exceeding that which he would have served had he not been found to be amenable to treatment. Where such amenability is a requisite for initial placement in a state institution for a term of years, does an extension of such placement unsupported by a determination of amenability deny petitioner the equal protection of the laws guaranteed by the Fourteenth Amendment?

OPINIONS BELOW

On September 10, 1981, the Court of Appeal for the Fourth Appellate District, Division One, issued its opinion in this matter which is reported as People v. Roberts, 123 Cal. App. 3d 684 (177 Cal. Rptr. 11). A copy of the opinion is attached as Appendix A. The order of the California Supreme Court denying a hearing in the matter is attached as Appendix B to this petition.

JURISDICTION

The Court of Appeals entered its judgment on September 10, 1981, and the order

of the California Supreme Court denying a hearing in the matter was filed November 18, 1981. Jurisdiction is conferred under Title 28, United States Code, section 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section One:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Welfare and Institutions Code, Section 6316.1 (b):

"(b) In the case of a person found to be a mentally disordered sex offender who committed a felony prior to July 1, 1977, who could have been sentenced under Section 1168 or 1170 of the Penal Code if the offense were committed after July 1, 1977, the Board of Prison Terms shall determine the maximum term of commitment which could have been imposed under subdivision (a), and the person may not be kept in actual custody longer than the maximum term of commitment, except as specified in Section 6316.2.

. . . ."

California Welfare and Institutions Code, Section 6316.2:

"(a) A person may be committed beyond the term prescribed by Section 6316.1 only under the procedure set forth in this section and only if such person meets all of the following:

(1) The 'sex offense' as defined in subdivision (a) of Section 6302 of which the person has been convicted is a felony, whether committed before or after July 1, 1977, or is a misdemeanor which was committed before July 1, 1977.

(2) Suffers (sic) from a mental disease, defect, or disorder, and as a result of such mental disease, defect, or disorder, is predisposed to the commission of sexual offenses to such a degree that he presents a substantial danger of bodily harm to others.

....

(j) Amenability to treatment is not required for a finding that any person is a person as described in subdivision (a), nor is it required for treatment of such person. Treatment programs need only be made available to such person. Treatment does not mean that the treatment be successful or potentially successful, nor does it mean that the person must recognize his or her problem and willingly participate in the treatment program."

STATEMENT OF THE CASE

Following petitioner's plea of guilty to murder in the second degree on October 30,

1973, he was found to be a mentally disordered sex offender (MDSO) and committed to the Department of Health for placement in a state hospital. The Board of Prison Terms later determined his maximum term of commitment would expire on August 19, 1980, and on May 16, 1980, the San Diego District Attorney filed a petition to extend petitioner's commitment as an MDSO. At the hearing on the petition, the trial court ruled amenability to treatment was not an issue to be determined. Petitioner was found to be a person described in W&I Code section 6316.2 (a) and it was ordered that his commitment be extended for a period of two years. People v. Roberts, 123 Cal App. 3d 684, 687 (1981).

At the commencement of the hearing on extending petitioner's commitment, both counsel for petitioner and the Deputy District Attorney joined in placing the issue of the constitutionality of W&I Code section 6316.2 (j) before the trial court (1 RT 1-5.) Counsel specifically relied upon the guarantees of equal protection and due process. (1 RT 13.) The trial court upheld the validity of the questioned statute. (1 RT 13-14.) The court of appeal entertained and rejected petitioner's arguments that the statute constituted a denial of due process and equal protection. People v. Roberts, supra at p. 687.

WHY THE WRIT SHOULD BE ALLOWED

I

DUE PROCESS REQUIRES THAT THOSE CONSIDERATIONS WHICH INITIALLY SUPPORTED A COMMITMENT FOR THE MAXIMUM TERM BE RELITIGATED BEFORE EXTENSION

In considering whether to place an MDSO in the Department of Health, a trial judge must determine whether the defendant "could have benefited by treatment in a state hospital or other facility." People v. Lock, 30 Cal. 3d 454, 460 (___ Cal. Rptr. ___) (1981). Absent a finding of such benefit the MDSO will go to state prison and be discharged at some point less than the maximum possible term. The finding of amenability to treatment, while resulting in a commitment to a state hospital rather than a prison, nonetheless means that an MDSO undergoing treatment "would also be incarcerated." (Ibid.) The supposed amenability to treatment exposes the MDSO to possibly "an even longer period of confinement if sent to a hospital as an MDSO." (Ibid.)

The hard questions come when the maximum term for the underlying offense has been served, as in the case of petitioner. All those who had been sent to state prison have been discharged from custody. If amenability is once again a requisite for commitment to an extended term, and found not to exist, petitioner might be discharged just as have been other MDSO's who have in fact served less time in custody for the same offense than has petitioner. In an effort to preclude this result, the Legislature has stated that amenability need not be found to extend petitioner's confinement two years (and possibly for life) beyond the maximum term otherwise set for the offense.

Obviously, the initial finding of amenability in cases such as petitioner's was erroneous: otherwise he would have been set free before now. Where a finding is required initially to support a confinement, however, the state may not, simply because of the

apparent error of the earlier finding, preclude consideration of the issue at a later hearing designed to support extended confinement. Due process requires, at a minimum, that petitioner be given an opportunity to present evidence on what is to him the most vital issue: whether there is any point in further incarceration beyond the term permitted by law in his case.

At one point in Georgia the law permitted the state to suspend a driver's license without a hearing on the issue of fault, where such fault was a key factor in the determination to initiate suspension proceedings. This Court held that due process required a hearing on this vital issue prior to implementation of the penalty. Bell v. Burton, 402 U.S. 535, 541 (1971). If due process safeguards drivers' licenses, it must necessarily safeguard petitioner against perpetual confinement because of his status, which is the effective result of forbidding evidence on the issue of his amenability to treatment. Because this vital federal question has been incorrectly decided by the state Court of Appeals, the writ should be issued in this matter.

II

EQUAL PROTECTION REQUIRES THAT PETITIONER BE TREATED SIMILARLY TO OTHERS IN HIS CLASS, AS NO COMPELLING STATE INTEREST SUPPORTS THE DIFFERING PROCEDURES APPLIED IN THE RECOMMITMENT HEARING

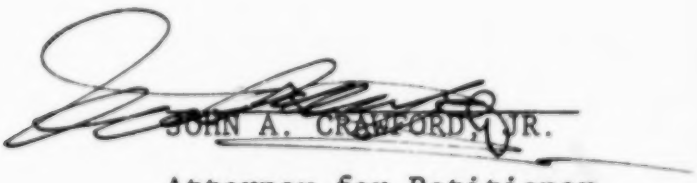
Where a fundamental interest such as liberty is in the balance, a compelling state interest must be demonstrated to support the

disparate treatment of two similarly situated groups of citizens. Petitioner is similarly situated to those facing commitment to a state facility for MDSO treatment: the only difference is thay he is facing recommitment. The Court of Appeal held the distinctions between the hearing for commitment and the hearing for recommitment were "necessary to further the state's compelling interest in preventing the 'premature release of dangerous persons'..." People v. Roberts, supra at p. 690.

With all due respect, this begs the question. The only reason an MDSO is exposed to confinement for the maximum term is his adjudication as amenable to treatment. Otherwise he is sent to state prison and a discharge at some earlier date, notwithstanding his continuing status as an MDSO. Petitioner is in the precise situation of those facing initial commitment to a state hospital: the only valid reason for such placement is the possibility of benefit, in the absence of which a term of years suffices. The state may not continue to confine petitioner on an indefinite basis simply by barring consideration of the very issue which permitted the initial placement. The biennial occurence of a recommitment ritual does not, and can not, provide petitioner with the equal protection of the laws mandated by the Constitution. Because this vital federal right was disregarded by the court below, the writ should issue in this case.

CONCLUSION

The only reason petitioner Roberts was in custody as long as August 19, 1980, was his assumed amenability to treatment. All non-amenable MDSO's convicted of the same offense would serve lesser terms of confinement in state prison. Roberts is now confined beyond the maximum term otherwise permitted (and may well, on the facts of his case, be confined for the rest of his life) as the result of a proceeding in which (1) he was denied due process by the statutory bar on receiving evidence on a vital issue, and (2) he was denied equal protection through being afforded a more restrictive hearing than others similarly situated. For these reasons it is respectfully submitted the writ of certiorari should issue.



JOHN A. CRAWFORD, JR.

Attorney for Petitioner

[Crim. No. 11896. Fourth Dist., Div. One. Sept. 10, 1981.]

THE PEOPLE, Plaintiff and Respondent, v.
BOB LEE ROBERTS, Defendant and Appellant.

SUMMARY

A person was adjudged to be a mentally disordered sex offender (MDSO) and committed to the Department of Public Health for placement at a state hospital for MDSO's after he pled guilty to second degree murder (Pen. Code, § 187) of a victim he was also charged with raping. Several months before his maximum term of commitment would expire, a petition to extend his commitment for two years was filed (Welf. & Inst. Code, § 6316.2, subd. (b)). At the hearing on the petition, the trial court ruled amenability to treatment was not one of the findings the trier of fact had to make in determining whether an MDSO's commitment could be extended. After he waived a trial by jury, the trial court found him to be an MDSO who presented a substantial danger of bodily harm to others (Welf. & Inst. Code, § 6316.2, subd. (a)), and ordered his commitment to be extended for two years (Welf. & Inst. Code, § 6316.2, subd. (f)). (Superior Court of San Diego County, No. CR 29954, Earl Ben Gilliam, Judge.)

The Court of Appeal affirmed. It held that the absence of a finding that the MDSO was amenable to treatment did not invalidate his extended commitment as an MDSO. In this connection it held that the extended commitment did not constitute cruel and unusual punishment. It further held that in authorizing recommitment of such an MDSO, Welf. & Inst. Code, § 6316.2, subd. (j), violates no principle of equal protection. (Opinion by Staniforth, J., with Cologne, Acting P. J., and Froelich, J.,* concurring.)

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*Assigned by the Chairperson of the Judicial Council.

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) Criminal Law § 198—Mentally Disordered Sex Offenders—Proceedings After Commitment—Extension—Amenability to Treatment.—Although a person found to be a mentally disordered sex offender (MDSO) may not initially be committed for confinement in a state hospital or appropriate public or private treatment facility unless a finding is made that the person can benefit by treatment (Crim. Code, § 6316, subd. (a)(1)), such a finding is not a prerequisite to recommitment of a person as an MDSO who has been previously committed as such.

[See **Cal.Jur.3d,** Criminal Law, § 264; **Am.Jur.2d,** Criminal Law, § 542.]

(2a, 2b) Criminal Law § 198—Mentally Disordered Sex Offenders—Proceedings After Commitment—Extension—Amenability to Treatment.—An order pursuant to Welf. & Inst. Code, § 6316.2, extending for two years the commitment of an accused previously adjudged to be a mentally disordered sex offender (MDSO) and committed to the Department of Mental Health after he pled guilty to murder of a rape victim was not rendered invalid by the absence of a finding the MDSO was amenable to treatment, where at the time of the extended commitment Welf. & Inst. Code, § 6316.2, subd. (j), provided that a finding of amenability is not required for recommitment as an MDSO of a person subject to such a recommitment. The extended commitment without a finding of amenability did not constitute cruel and unusual punishment, and the recommitment provision of Welf. & Inst. Code, § 6316.2, subd. (j), violates no principle of equal protection. Even assuming persons initially committed as MDSO's are similarly situated with persons who are subject to having their commitment as an MDSO extended could be considered similarly situated, any distinctions drawn by Welf. & Inst. Code, § 6316.2, subd. (j), between the findings required for extended commitment as opposed to those required for an initial commitment as an MDSO are necessary to further the state's compelling interest in preventing the premature release of dangerous persons.

(3) Constitutional Law § 76—Equal Protection—Nature and Scope.—The first prerequisite to a meritorious claim under the equal pro-

tection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.

COUNSEL

John A. Crawford, Jr., for Defendant and Appellant.

George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant Attorney General, Daniel J. Kremer, Assistant Attorney General, Richard D. Garske and Richard D. Hendlin, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

STANIFORTH, J.—Defendant Bob Lee Roberts appeals from an order extending his commitment as a mentally disordered sex offender (MDSO) for two years pursuant to Welfare and Institutions Code section 6316.2.[1] Roberts contends section 6316.2, subdivision (j), is unconstitutional because it provides a finding of amenability is not a prerequisite for extending the commitment of an MDSO beyond the maximum term he could have served for the underlying criminal offense. We conclude Roberts' argument is without merit.

FACTS

On August 5, 1973, Roberts picked up 15-year-old Cherie W., who was hitchhiking, and took her to his house. When Cherie refused to let Roberts kiss her, Roberts dragged her into the bedroom, took her clothes off, tied her up, forced her to engage in various acts of oral copulation, and then raped her. Later, when Cherie began to scream, Roberts either strangled her, used an extension cord to electrocute her, or both.[2]

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[1]All references are to the Welfare and Institutions Code unless otherwise specified.

[2]One psychiatrist's report indicates Roberts originally told him he strangled the girl. However, Roberts later changed his story and described in gory detail how he electrocuted the girl. The latter story was also told to another psychiatrist.

Roberts pleaded guilty to murder in the second degree (Pen. Code, § 187) on October 30, 1973. The trial court adjourned the criminal proceedings and certified Roberts for hearing and examination (§ 6302) to determine whether he was an MDSO under section 6300 et seq. Roberts was found to be an MDSO and was committed to the Department of Health for placement at Atascadero State Hospital (§ 6316) where he remained until March 21, 1980, when he was transferred to Patton State Hospital.

The Board of Prison Terms determined Roberts' maximum term of commitment would expire on August 19, 1980. (§ 6316.1, subd. (b).) On May 16, 1980, the San Diego District Attorney filed a petition to extend Roberts' commitment as an MDSO (§ 6316.2, subd. (b)). At the hearing on the petition, the trial court ruled amenability to treatment was not one of the findings the trier of fact had to make in determining whether an MDSO's commitment could be extended. After Roberts waived a trial by jury, the trial court found Roberts to be an MDSO who presented a substantial danger of bodily harm to others (§ 6316.2, subd. (a)) and ordered his commitment be extended for two years. (§ 6316.2, subd. (f).)

Roberts contends his recommitment in the absence of a finding that he is amenable to treatment constitutes cruel and unusual punishment, a denial of due process and a denial of equal protection.

Discussion

Whether a finding of amenability to treatment is required before the commitment of an individual determined to be an MDSO may be extended under section 6316.2 is not a novel issue in California. The several appellate courts addressing this issue are in disagreement. (Compare *People* v. *Compelleebee* (1979) 99 Cal.App.3d 296 [160 Cal.Rptr. 233] and *People* v. *Lakey* (1980) 102 Cal.App.3d 962 [162 Cal.Rptr. 653] with *People* v. *Poggi* (1980) 107 Cal.App.3d 581 [165 Cal.Rptr. 758] and *People* v. *Henderson* (1981) 117 Cal.App.3d 740, 747 [172 Cal.Rptr. 858].) Roberts urges this court to follow *Compelleebee, supra*, and *Lakey, supra*, holding that an MDSO cannot be recommitted without a prior determination of amenability to treatment.

The California Board of Prison Terms is required, under subdivision (b) of section 6316.1, to compute the "maximum term of commitment" for all persons found to be MDSO's who committed a felony before

July 1, 1977, based upon the longest term of imprisonment which could have been imposed if the offense had been committed after July 1, 1977. A person so found to be an MDSO may be kept in actual custody beyond that maximum term of commitment only as provided in section 6316.2 (§ 6316.1, subd. (b).) Section 6316.2, subdivision (a), provides in relevant part: "A person may be committed beyond the term prescribed by Section 6316.1 only under the procedure set forth in this section and only if such person meets all the following:

"(1) The 'sex offense' as defined in subdivision (a) of Section 6302 of which the person has been convicted is a felony, whether committed before or after July 1, 1977 ....

"(2) Suffers from a mental disease, defect, or disorder, and as a result of such mental disease, defect, or disorder, is predisposed to the commission of sexual offenses to such a degree that he presents a substantial danger of bodily harm to others." Subdivision (j) of section 6316.2, which was added by the Legislature in 1979 and which was in effect at the time the petition for recommitment in the instant case was filed, further provides: "Amenability to treatment is not required for a finding that any person is a person as described in subdivision (a), nor is it required for treatment of such person. *Treatment programs need only be made available to such person.* Treatment does not mean that the treatment be successful or potentially successful, nor does it mean that the person must recognize his or her problem and willingly participate in the treatment program." (Italics added.) (1) Thus, although a person found to be an MDSO may not *initially* be committed for confinement in a state hospital or appropriate public or private treatment facility unless a finding is made "that the person could benefit by treatment" (§ 6316, subd. (a)(1)), the 1979 amendment has made it clear the Legislature did not intend to make such a finding a prerequisite to *recommitment.* (See *People* v. *Poggi, supra,* 107 Cal.App.3d at pp. 587-588.)

People v. *Poggi, supra,* is the most recent case to fully examine the issue of whether a finding of amenability to treatment is constitutionally required before the commitment of an MDSO may be extended. At the time of the earlier decisions of *Compelleebee, supra,* 99 Cal.App.3d 296, and *Lakey, supra,* 102 Cal.App.3d 962, and when the petition for extended commitment was filed in *Poggi,* section 6316.2 was silent as to whether such a finding was a necessary prerequisite to extending an MDSO's commitment. (*People* v. *Poggi, supra,* 107 Cal.App.3d at

p. 587; *People* v. *Compelleebee, supra*, 99 Cal.App.3d at pp. 299-300; *People* v. *Lakey, supra*, 102 Cal.App.3d at p. 970, fn. 7.)

However, unlike *Compelleebee* and *Lakey*, where the courts both determined subdivision (j) could not be given effect because it had been subsequently enacted, the *Poggi* court found the addition of subdivision (j) as an urgency statute with the express purpose of *clarifying* the law *precluded* the court from construing section 6316.2 together with other sections of the MDSO law to *imply* the requirement of a finding of amenability (*People* v. *Poggi, supra*, 107 Cal.App.3d at pp. 587-588). Dicta in *Compelleebee* and *Lakey* questions the constitutionality of subdivision (j) under *People* v. *Feagley* (1975) 14 Cal.3d 338 [121 Cal. Rptr. 509, 535 P.2d 373] (*People* v. *Compelleebee, supra*, 99 Cal.App. 3d at p. 302, fn. 4; *People* v. *Lakey, supra*, 102 Cal.App.3d at pp. 970-971, fn. 7).

Reliance on *Feagley, supra*, for the proposition that subdivision (j) is unconstitutional is misplaced. *Poggi* correctly distinguished *Feagley* in these respects: "Feagley was a mentally disordered sex offender who, in the unanimous opinion of the experts, would not benefit by care or treatment in a state hospital. Under *former* Welfare and Institutions Code section 6326, since repealed, he was thereupon committed for an *indeterminate* (and *unlimited*) *period* to a *prison* under the jurisdiction of the Department of Corrections. The Supreme Court repeatedly emphasized that Feagley was in a prison and as a practical matter did not have available to him the treatment facilities or programs of a state hospital. (*Id.*, 14 Cal.3d at pp. 362-376.) The court *held* that the state may not involuntarily confine a civilly committed mentally disordered sex offender (1) for an indefinite period (2) in a prison setting. (*Id.*, at p. 376.) Although the statute in question there contained no time limit, the court recognized that it was up to the Legislature to determine the length of term necessary to protect society against a potential recurrence of the dangerous conduct of a mentally disordered sex offender. (*Id.*)

"The new statutory scheme satisfies the requirements of *Feagley*. Unlike *Feagley*, an MDSO committed under section 6316.2 is not subject to an indefinite term. The extension is for a limited period of one year [now two years] (Welf. & Inst. Code, § 6316.2, subd. (f)). Each such extension comes about only after a trial at which '[t]he patient shall be entitled to the rights guaranteed under the Federal and State Constitu-

tions for criminal proceedings.' (Welf. & Inst. Code, § 6316.2, subd. (e).)

"A person subject to extension under section 6316.2 is not, like Feagley, confined in a prison setting. Rather, the person is committed to a treatment facility of the State Department of Mental Health, which is under a mandatory statutory obligation to provide treatment. (Welf. & Inst. Code, § 6316.2, subds. (f), (i).)" (107 Cal.App.3d at pp. 589-590; fns. omitted.) We agree. The *Poggi* court reasoning is sound. *Feagley* is distinguishable on its facts and in no way compels the conclusion subdivision (j) is unconstitutional.

(2a) Contrary to Roberts' contention, subdivision (j) does not violate the constitutional right to equal protection of the laws (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7) because it provides amenability to treatment is not required for a finding that a person who meets the requirements of section 6316.2, subdivision (a), may be subjected to a period of extended commitment. **(3)** As stated by our Supreme Court, "[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." (*In re Eric J.* (1979) 25 Cal.3d 522, 530 [159 Cal.Rptr. 317, 601 P.2d 549].) **(2b)** Roberts argues persons subject to extended commitment proceedings under section 6316.2 are "similarly situated" with persons initially committed as MDSO's under section 6316. However, unlike persons initially committed as MDSO's, who can be returned to the committing court for further proceedings on the criminal charge if it is subsequently found that they have not recovered and are still a danger to the health and safety of others (§ 6325, subd. (6)), persons who are subject to having their commitment extended have already been committed for the maximum term of commitment and can be kept in actual custody only as provided in section 6316.2 (§ 6316.1). Even if we were to assume these two groups were similarly situated, any distinctions drawn by section 6316.2, subdivision (j), between the findings required for extended commitments as opposed to those required, for an initial commitment as an MDSO, are necessary to further the state's compelling interest in preventing the "premature release of dangerous persons" (Stats. 1977, ch. 164, § 6, p. 638; *People* v. *Poggi, supra*, 107 Cal.App.3d at p. 592). Thus, subdivision (j) violates no principle of equal protection.

Roberts also contends extending the commitment of an MDSO without a finding of amenability would constitute cruel and unusual punishment. In *People* v. *Poggi, supra* (107 Cal.App.3d at pp. 589-592) and *People* v. *Henderson, supra* (117 Cal.App.3d at p. 747), these contentions were thoughtfully reviewed and rejected. We agree with the analysis made.

The order of commitment is affirmed.

Cologne, Acting P. J., and Froehlich, J.,* concurred.

.ERK'S OFFICE, SUPREME COUR
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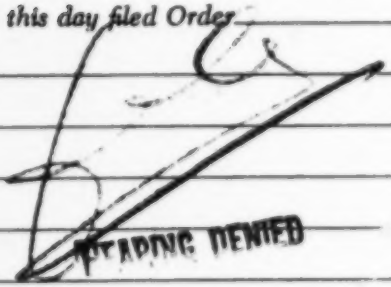

In re: 4 Crim. *No.* 11896

PEOPLE

vs.

BOB LEE ROBERTS

Respectfully,

Clerk

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Opposition

Supreme Court, U.S.
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NO. 81-1332

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October Term 1981

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THE PEOPLE OF THE STATE OF CALIFORNIA,

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ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FOR THE FOURTH APPELLATE DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION

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Whether former California Welfare and Institutions Code section 6316.2, subdivision (j), which provides a finding of amenability to treatment is not a prerequisite for extending the commitment of a mentally disordered sex offender beyond the maximum term he could have served for the underlying criminal offense, constitutes a denial of the rights to due process and equal protection.

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	6316.2, subd. (i)	8,11
	6316.2, subd. (j)	5,7,8,12, 15,16
Stats. 1977, Ch. 164, § 6		15
Stats. 1979, Ch. 992, §§ 1, 2		6,7
Stats. 1981, Ch. 928, § 2		4
Stats. 1981, Ch. 928, § 3		8

NO. 81-1332

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1981

BOB LEE ROBERTS,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FOR THE FOURTH APPELLATE DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

The California Court of Appeal, Fourth Appellate District, Division One, issued its opinion in this matter which is reported as People v. Roberts (1981) 123 Cal.App.3d 684 (177 Cal.Rptr. 11). The California Supreme Court denied a hearing in this matter.

JURISDICTION

This Court has jurisdiction to consider this case pursuant to 28 U.S.C. 1257, subdivision 3.

STATUTORY PROVISIONS INVOLVED

The applicable statutory provisions involved are set forth in Appendix A.

STATEMENT OF THE CASE

On August 5, 1973, petitioner picked up 15-year old Cherie W., who was hitchhiking, and took her to his house. When Cherie refused to let petitioner kiss her, he dragged her into the bedroom, took her clothes off, tied her up, forced her to engage in various acts of

oral copulation, and then raped her. Later, when she began to scream, petitioner either strangled her, used an extension cord to electrocute her or both. (People v. Roberts, supra, 123 Cal.App.3d 684, 686.)

On October 30, 1973, petitioner pled guilty to murder in the second degree. On November 28, 1973, he was found to be a mentally disordered sex offender (MDSO) who could benefit by treatment in a state hospital and was committed to the Department of Mental Health for placement at Atascadero State Hospital where he remained until March 21, 1980, when he was transferred to Patton State Hospital.

Later, the Board of Prison Terms determined petitioner's maximum commitment would expire on August 19, 1980. On May 16, 1980, the San Diego

County District Attorney filed a petition to extend for two years petitioner's commitment as an MDSO pursuant to Welfare and Institutions Code section 6316.2,[1/] subdivision (b). At the hearing on the petition, the trial court held amenability to treatment was not one of the findings the trier of fact had to make in determining whether an MDSO's commitment should be extended. After petitioner waived his right to jury trial, the trial court found petitioner to be an MDSO who presented a substantial danger of bodily harm to others (Welf. & Inst. Code, § 6316.2, subd. (a)) and ordered his commitment be extended for two years. (People v. Roberts, supra, 123 Cal.App.3d 684, 687.)

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1. In 1981, the California Legislature repealed the mentally disordered sex offender laws prospectively only. (Stats. 1981, Ch. 928, § 2.)

ARGUMENT

I

THE MDSO RECOMMITMENT PROCEEDINGS COMPORT WITH DUE PROCESS

Petitioner contends due process requires that those considerations which initially supported a commitment for the maximum term be relitigated before extension of the commitment. He argues that since a finding of amenability to treatment must initially be made to support placement of an MDSO in a hospital, due process requires that petitioner be allowed to present evidence on the issue of amenability to treatment at a recommitment hearing contrary to the terms of Welfare and Institutions Code section 6316.2, subdivision (j). However, since the extended commitment proceedings are meaningful and appropriate to the nature

of the case it comports with procedural due process. (See Bell v. Burson (1971) 402 U.S. 535, 539-540.)

At the time of petitioner's extension hearing, Welfare and Institutions Code section 6316.2 provided in relevant part:

> "(a) A person may be committed beyond the term prescribed by Section 6316.1 only under the procedure set forth in this section and only if such person meets all of the following:
>
> "(1) The 'sex offense' as defined in subdivision (a) of Section 6302 of which the person has been convicted is a felony, whether committed before or after July 1, 1977, or is a misdemeanor which was committed before July 1, 1977.
>
> "(2) Suffers from a mental disease, defect, or disorder, and as a result of such mental disease, defect, or disorder, is predisposed to the commission of sexual offenses to such a degree that he presents a substantial danger of bodily harm to others." (Cal. Stats. 1979, Ch. 992, §§ 1, 2, pp. 3709-3714.)

In 1979, section 6316.2 was amended to add subdivision (j) which states:

> "Amenability to treatment is not required for a finding that any person is a person as described in subdivision (a), nor is it required for treatment of such person. Treatment programs need only be made available to such person. Treatment does not mean that the treatment be successful or potentially successful, nor does it mean that the person must recognize his or her problem and willingly participate in the treatment program." (Cal. Stats. 1979, Ch. 992, § 2, p. 3381.)

Contrary to appellant's assertion, due process does not require a finding of amenability to treatment as a prerequisite for extension of MDSO commitment. Due process requires the nature and duration of commitment bear some reasonable relation to the purpose for which the individual was committed. (Jackson v. Indiana (1972) 406 U.S. 715, 738.) The California Legislature has

found the purposes of the mentally disordered sex offender commitment have been "to provide adequate treatment of these offenders, adequate controls over these persons by isolating them from a free society, and to protect the public from repeated commission of sex crimes." (Stats. 1981, Ch. 928, § 3, p. 3367; People v. Feagley (1975) 14 Cal.3d 338, 361.)

Any commitment to the State Department of Mental Health under section 6316.2 places an affirmative obligation on the Department to provide treatment for the underlying causes of the person's mental disorder. (Welf. and Inst. Code, § 6316.2, subd. (i).) The obligation to provide treatment applies to MDSOs who are not amenable as well as to those who are. Under subsection (j) of section 6316.2

treatment programs need only be made available to MDSOs. In the instant case, the trial court accepted the people's offer of proof that a psychiatrist at Atascadero State Hospital and a psychologist at Patton State Hospital indicated there would be treatment programs available to petitioner upon his return to either of those institutions. Insofar as the purpose of commitment of MDSOs is treatment, and by the express requirement treatment must be given, the nature of the re-commitment bears a reasonable relation-ship to its purpose.

Similarly, insofar as the purpose of commitment of MDSOs is the protection of the public from dangerous persons, the nature of the recommitment procedures bears a reasonable relation-ship to its purpose. It is fully

consistent with due process to commit dangerous, nonamenable sex offenders to a facility of the State Department of Mental Health. Such commitment is not imposed as punishment for the underlying crime, but rather for the protection of society. (See Conservatorship of Hofferber (1980) 28 Cal.3d 161, 182; In re Moye (1978) 22 Cal.3d 457, 467-468; People v. Poggi (1980) 107 Cal.App.3d 581, 590-591.)

An extension of commitment under Welfare and Institutions Code section 6316.2 comes about only after a jury trial, unless waived, at which the patient is entitled to the rights guaranteed under the Federal and State Constitutions for criminal proceedings. (Welf. and Inst. Code, § 6316.2, subd. (e).) In addition, a person subject to extension is not confined to a prison

setting. Rather, the person is committed to a treatment facility of the State Department of Mental Health which is under a mandatory obligation to provide treatment. (Welf. and Inst. Code, § 6316.2, subds. (f) and (i).) Since treatment must be made available even to the unwilling participant, even those MDSOs are afforded a realistic opportunity to be cured or to improve his or her mental condition. (People v. Henderson (1981) 117 Cal.App.3d 740, 747.) Because the recommitment proceedings fully comport with due process requirements, the petition for writ of certiorari should be denied.

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II

WELFARE AND INSTITUTIONS CODE SECTION 6316.2, SUBDIVISION (j) DOES NOT VIOLATE PETITIONER'S CONSTITUTIONAL RIGHT TO EQUAL PROTECTION OF THE LAWS

Petitioner contends he was denied equal protection of the laws since a finding of amenability to treatment is not required for extension of commitment under Welfare and Institutions Code section 6316.2, subdivision (j) whereas the initial commitment of an MDSO requires a finding the person can benefit from treatment. Petitioner has failed to meet the threshold requirement of a meritorious claim under the equal protection clause by failing to show that the State has adopted a classification that affects two or more similarly situated groups in an unequal manner. (In re Eric J. (1979) 25 Cal.3d 522, 530.) Contrary

to petitioner's assertion, the class of MDSOs confronted with extended commitment proceedings are not similarly situated with those facing original commitment to a State facility for MDSO treatment. An MDSO such as petitioner who is subject to having his commitment extended has already been committed for the maximum term of the underlying offense and can be kept in actual custody only as provided for in section 6316.2. (Welf. and Inst. Code, § 6316.1.) In contrast, persons initially committed as MDSOs can be returned to the committing court for further proceedings on the criminal charge if it is subsequently found that they have not recovered and are still a danger to the health and safety of others. (People v. Roberts, supra, 123 Cal.App.3d 684, 690.)

Moreover, by definition the two groups are different. While under Welfare and Institutions Code section 6300 an MDSO is any person who "by reason of mental defect, disease, or disorder, is predisposed to the commission of sexual offenses to such a degree that he is dangerous to the health and safety of others", section 6316.2 requires for commitment beyond the maximum term the person be predisposed to the commission of sexual offenses to such a degree that he presents "a substantial danger of bodily harm to others." Thus, there is a greater degree of danger required to be shown to recommit someone than there is for the initial commitment.

Even assuming arguendo the two classes of MDSOs are deemed "similarly situated", any distinction drawn by

section 6316.2, subdivision (j) between the findings required for extended commitment as opposed to those required for an initial commitment as an MDSO, are necessary to further the State's compelling interest in preventing the "premature release of dangerous persons." (Stats. 1977, Ch. 164, § 6, p. 638; People v. Poggi, supra, 107 Cal.App.3d 581, 592.)

If, as petitioner contends, a finding of amenability is required for extended commitment, those dangerous persons who are least likely to be rehabilitated would be let loose on society and thereby frustrate the legitimate interests of the State. Since the State has a compelling interest which justifies the law and any distinction drawn by the law is necessary to further that purpose,

there is no unconstitutional denial of equal protection. (See People v. Olivas (1976) 17 Cal.3d 236, 251.) Because the State Court of Appeal properly upheld the constitutionality of Welfare and Institutions Code section 6316.2, subdivision (j), the petition for writ of certiorari should be denied.

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CONCLUSION

For the foregoing reasons, respondent respectfully requests the petition for writ of certiorari be denied.

Respectfully submitted,

GEORGE DEUKMEJIAN,
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CALIFORNIA STATUTES

Welfare and Institutions Code sections

§ 6300.

As used in this article, 'mentally disordered sex offender' means any person who by reason of mental defect, disease, or disorder, is predisposed to the commission of sexual offenses to such a degree that he is dangerous to the health and safety of others. . . . .

§ 6316.1

(a) In the case of any person found to be a mentally disordered sex offender who committed a felony on or after July 1, 1977, the court shall state in the commitment order the maximum term of commitment, and the person may not be kept in actual custody longer than the maximum term of commitment, except as provided in Section 6316.2. . . . .

§ 6316.2

(e) The patient shall be entitled to the rights guaranteed under the Federal and State Constitutions for criminal proceedings. All proceedings shall be in accordance with applicable constitutional guarantees. . . . .

(i) Any commitment to the State Department of Mental Health under this article places an affirmative obligation on the department to provide treatment for the underlying causes of the person's mental disorder.

AFFIDAVIT OF SERVICE BY MAIL

ATTORNEY:

George Deukmejian, Attorney General
Daniel J. Kremer, Assistant Attorney General
Richard D. Hendlin, Deputy Attorney General

NO. 81-1332

BOB LEE ROBERTS,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

I, the undersigned, say: I am a citizen of the United States, over 18 years of age, employed in the County of San Diego, in which county the within-mentioned mailing occurred, and not a party to the subject cause; my business address is 110 West A Street, Suite 700, San Diego, California 92101.

I served the within BRIEF OF RESPONDENT IN OPPOSITION ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE FOURTH APPELLATE DISTRICT: of which a true and correct copy of the document filed in the cause is affixed, by placing three (3) copies thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

John A Crawford,
Attorney at Law
1010 Second Avenue, Ste. 1825
San Diego, CA 92101

G. E. Bishel, Clerk
California Supreme Court
350 McAllister St., Rm. 4050
San Francisco, CA 94102

Keenan G. Casady, Clerk
Court of Appeal
Fourth District, Div. One
1350 Front St., Rm. 6010
San Diego, CA 92101

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County Clerk
San Diego County
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District Attorney
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San Diego, CA 92101

Each envelope was then sealed and with the postage prepaid deposited in the United States Mail by me at San Diego, California, on the 7th day of April, 1982.

There is a delivery service by United States mail at each place so addressed or regular communication by United States mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, April 7, 1982

Clifford E. Reed Jr.
CLIFFORD E. REED, JR.

Subscribed and sworn to before me this 7th day of April, 1982

Karen K. Fox
Notary Public in and for said County and State

KAREN K. FOX
NOTARY PUBLIC — CALIFORNIA
COUNTY OF SAN DIEGO
My Commission expires Feb. 3, 1984